Supreme Court of the United States

OCTOBER TERM, 1941.

No.

CLAYTON LOFLAND,

Petitioner,

v.

CLARENCE H. FOX, Receiver of the HARTFORD STERLING CO., INC.

Respondent.

BRIEF IN SUPPORT OF PETITION.

I.

OPINIONS BELOW.

The opinion of the Supreme Court of Pennsylvania is officially reported in 20 Atlantic Reporter (2d) 224, 225.

The Opinion of the Court of Common Pleas of Delaware County, Penna. is not reported but appears on pages 96a, 100a of the Record.

II.

JURISDICTION.

The opinion of the Supreme Court of Pennsylvania denying petitioner's application for reargument is dated May 26, 1941. A petition to extend the time for filing this petition for certiorari to September 10, 1941 was allowed on August 25, 1941, by your Honorable Court. Petition for Writ of Certiorari is brought pursuant to Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (Act of Cong., Feb. 13, 1925, C. 229, Sec. 1; Stat. 938; 28 U. S. C. A. Sec. 347)

III.

STATEMENT OF THE CASE.

The case has already been stated in the petition, and said statement, in the interest of brevity, is hereby incorporated in and made a part of this brief.

IV.

SPECIFICATION OF ERRORS TO BE URGED.

The errors to be urged by petitioner have already been stated in the petition, and they, in the interest of brevity, are hereby incorporated and made a part of this brief.

V.

ARGUMENT

A.

A Court of Equity cannot assume jurisdiction and appoint a permanent receiver without violating the XIV Amendment to the Federal Constitution, where there has been no legal service of the bill in equity commencing the proceedings upon the defendant corporation, and petitioner received no notice up to the time of said appointment; where too the subject matter of the suit is beyond its jurisdiction, and no hearing on the bill in equity was ever had thereon.

The only thing which receiver's Counsel did before the receiver in this case was appointed was to send a registered letter to petitioner and defendant corporation dated June 4, 1934, in which he stated that he was "going to file a Bill in Equity in the Court of Common Pleas of Dela-

ware County and ask for the appointment of a Receiver on Wednesday at 10:00 A. M. Daylight Saving Time" (Record 83a, 84a).

There was nothing in said letter to indicate when and where the hearing upon the application for a receiver would take place.

Despite the fact that the Bill of Complaint had not been served upon the defendant Corporation and/or its non resident officers, and despite the fact too that *no notice* was ever given any of the creditors of the Hartford Sterling Co., *on the same day* the bill was filed a *permanent* receiver was appointed. The Court below entered the following decree notwithstanding the fact that no proof of service upon the defendant was ever made, and no hearing was ever had:

> "And now, to wit: June 6, 1934, upon consideration of the bill filed in the above case and hearing thereon, it is ordered, adjudged and decreed as follows: That Clarence H. Fox be and is hereby appointed Receiver of all the assets and property, franchises, rights and privileges of whatsoever kind, of the Hartford Sterling Company, a corporation of the State of Pennsylvania, within jurisdiction of this Court, with the power to take, hold, demand, receive and collect all the funds, assets and property belonging to the company, or in hands of any debtor, agent or depository of said company, and to account to the court for the same. And any agent or depository of company, as well as the said company, is hereby directed to forthwith pay, deliver and assign all money, securities, assets and property of every kind whatever to said receiver, and the receiver is hereby empowered to bring, prosecute and defend all suits at law or in equity which in his judgment may be necessary for the preservation and

protection of property and interests under his control—That upon security being entered by the receiver as required by law, the said Hartford Sterling Co., its agents and employes and all other persons are hereby enjoined from retaining or taking possession of the money, or retaining, taking, delivering any of the assets of the said company, and from collecting or receiving any of the money, securities, or property of the said company, or in any way dealing with the full and absolute possession and control thereof by the said receiver by suit at law or in equity without first obtaining leave of your Honorable Court. (No cash to come into receiver's hands till additional security is entered)—That security be entered by Receiver in the sum of $1000.00. June 7, 1934—Bond Filed—W. Roger Fronefeld, President Judge."

Throughout this case receiver has not once contended that defendant Corporation and/or its officers were legally served with the bill in equity, or that petitioner ever appeared when the receiver was appointed. He seems satisfied that the mere sending of a registered letter dated June 4, 1934 that on June 6, 1934 he is going to file a bill in equity and ask for the appointment of a receiver, satisfies the due process of law requirement. Is the sending of a registered letter, one day before the action of a Court, a legal notice, and does that give any party in interest a reasonable time to prepare his defense, when his rights are to be attacked and his property snatched from him? Was that such a legal notice so that defendant Corporation, petitioner a non-resident, and other creditors were given the equal protection of the laws? Was petitioner's property in the insurance policies assigned and transferred to him years previous to the appointment of a

receiver, taken from him by due process of law? Petitioner has consistently complained that he was never afforded an opportunity to appear and protect his property in the assigned and transferred policies before a receiver was appointed in this case. Why has his just complaint thus far fallen upon deaf ears?

The legal authorities are numerous holding that such a high-handed procedure in this case does not afford one due process of law and the equal protection of the laws.

In the leading case upon this subject, *Pennoyer v. Neff*, 95 U. S. 714, an action was brought to recover possession of a tract of land situated in the State of Oregon. Plaintiff claimed title by reason of a United States patent issued to him. Defendant claimed to have acquired the premises under a sheriff's deed, made upon a sale of the property on execution issued upon a judgment recovered against the plaintiff in one of the Circuit Courts of the State. The case turned upon the validity of this judgment. At the time the action was commenced and the judgment rendered, the defendant therein, the plaintiff in this case, was a non-resident of the State, was not personally served with process and did not appear in court. The judgment was entered upon his default in not answering the complaint upon a constructive service of summons. This Court then speaking through Mr. Justice Field at page 733 said:

> "Proceedings in a court of justice to determine the personal rights and obligations of parties over whom the Court has no jurisdiction, do not constitute due process of law."

In the instant case the Court below determined the rights and obligations of defendant Corporation, the Hartford Sterling Co. and petitioner Lofland, though it had no jurisdiction over either or both of them. Therefore its decree

appointing the respondent, as receiver of said Corporation, does not constitute due process of law and is a nullity.

In *Webster v. Reed,* 11 How. 437, at page 450, it was stated:

> "Is the principle consecrated by the venerable system of the Common law and incorporated into our Constitution, that no person shall be deprived of his property unless by due process of law, to be thus trifled with and frittered away? This Court has always appreciated and held sacred this right of the citizen to due notice of judicial proceedings against him; and it affords us pleasure to quote its bold and eloquent language."

In *Shrivers Lessee v. Lynn, et al.,* 2 Harvard 60, it was there said:

> "No Court however great may be its dignity, can arrogate to itself the power of disposing of real estate without forms of law. It must obtain jurisdiction of the thing in a legal mode. A decree without notice would be treated as a nullity."

In *Hollingsworth v. Barbour et al;* 4 Peters 475, the Court said:

> "It is an acknowledged general principle, that judgments and decrees are binding only upon parties and privies. The reason of the rule is founded in the immutable principles of natural justice, that no man's rights should be prejudiced by the judgment or decree of a Court, without an opportunity of defending the rights."

In *D'Arcy v. Ketchum et al.*, 11 How. 165, at page 170, it is stated:

> "By the general law of the land, no court is authorized to render a judgment or decree against any one, or his estate, until after due notice by service of process to appear and defend."

And again at page 176—

> "On the other hand, the international law as it existed among the states in 1790 was, that a judgment rendered in one state, assuming to bind the person of a citizen of another, was void within the foreign state, when the defendant had not been served with process or voluntarily made defence, because neither the legislative jurisdiction nor that of courts of justice, had binding force."

In *Riverside and D. R. Cotton Mills v. Menefee*, 35 S. Ct. 579, at page 580 this Court stated:

> "That to condemn without a hearing is repugnant to the due process clause of the XIV Amendment needs nothing but statement. Equally well settled is it that the courts of one state cannot, without a violation of the due process clause of the Constitution extend their authority beyond their jurisdiction so as to condemn the resident of another state when neither *his person nor his property* is within the jurisdiction of the court rendering the judgment, since that doctrine was long ago established by the decision in Pennoyer v. Neff 95 U. S. 714, 24 L. Ed. 565 and has been without deviation upheld by a long line of cases." (Italics Supplied)

To the same effect see—

St. Clair v. Cox, 106 U. S. 350, 1 S. Ct. 354;
Freeman v. Alderson, 119 U. S. 185, 7 S. Ct. 165;
Wilson v. Seligman, 144 U. S. 41, 12 S. Ct. 541;
Scott v. McNeal, 154 U. S. 34, 14 S. Ct. 1108;
Caledonian Coal Co. v. Baker, 196 U. S. 432, 25 S. Ct. 375;
Haddock v. Haddock, 201 U. S. 562, 26 S. Ct. 525;
Clark v. Wells, 203 U. S. 164, 27 S. Ct. 43;
Hunter v. Mutual Reserve Life Ins. Co., 218 U. S. 573, 31 S. Ct. 127.

"A distinction is to be made between a case where there is no service whatever, and one which is simply defective or irregular. In the first case, the court acquires *no jurisdiction* and its *judgments are void.*" Freeman On Judgments Para. 342.

It should be remembered that petitioner Lofland was a resident of the State of New Jersey when the receiver in this case was appointed. Could the Court below enter a decree affecting his rights to certain property in his absence? Was he obliged to come into court merely because he received a registered letter after a receiver was appointed, which contained no reference to time or place when a hearing would be had? Process of a state court of Penna. could not run into New Jersey and summon Lofland to leave that territory and respond to proceedings brought in another state. As was stated by Mr. Justice Field in the Pennoyer case supra, at page 714—

"Every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory and no state can exercise direct jurisdiction and authority over persons or property without its ter-

ritory . . . . . Publication of process or *notice within the state where the tribunal sits cannot create any greater obligation upon the non-resident to appear.*" (Italics supplied)

In *Noxon Chemical Products Co. v. Leckie,* 39 F. (2) 318, where a Receiver was appointed February 25, 1925 and decree was Reversed February 21, 1930, the Court said:

"Jurisdiction of the person is ordinarily understood to mean the power, obtained by the service of a summons or other proper process or notice, on a defendant personally within the territorial limits of the jurisdiction, or by a voluntary appearance in person or by attorney to render a personal judgment; and the state court can acquire no jurisdiction of an action where neither the person nor any property of the defendant can be found within the state. Corpus Juris, Vol. 15, page 786.

This author also says that there must be some service on the defendant in some mode authorized by the law or the court cannot proceed, and a judgment rendered without such service is a nullity; and that service of process or the prescribed legal or statutory notice is always a prerequisite to jurisdiction over either the person or the property and that the statutory mode of service or of giving notice must be followed, including requirements as to time. A person's knowledge of the existence of an action, no matter how clearly brought home to him, does not supply the want of compliance with the statutory or legal requirements as to service; even a person's presence in court does not give the court jurisdiction to enter a judgment when he was not brought there by any legal means."

In *Windsor v. McVeigh,* 93 U. S. 274, this Court held at page 277—

> "A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights is admitted. *Until notice is given,* the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the laws of its organization, *over the subject matter.*" (Italics supplied)
>
> "It is patent that any scheme or so called procedure which (upon an order issued to an ex parte affidavit) would permit one person to take from another any article, or record, or property, arbitrarily, without any hearing, or day in court, or without affording any opportunity to be heard would be to take the property of another without due process of law."
>
> *Hovey vs. Elliott,* 167 U. S. 409, 17 S. Ct. 841.

In the case at bar the court below had no jurisdiction over the persons of defendant or petitioner. Nor did it have jurisdiction over the subject matter, first, because the subject matter was in petitioner's possession over in New Jersey and no other assets remained in its jurisdiction, and second, because there was no process of the Court served upon anyone concerned in the controversy and no hearing held thereon.

> "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been

made a party by service of process. Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; 1 Freemen on Judgments 5th Ed. Para. 407."—

Hansberry v. Lee, 61 S. Ct. 115, 120.

It was well stated by this Court in *Davidson v. New Orleans,* 96 U. S. 97 that—

> "That a man is entitled to some notice before he can be deprived of his property is an axiom of the law to which additional authority would give no additional weight, but upon the question of the *length* of such notice there is a singular dearth of judicial decisions. It is manifest that the requirement of notice would be of *no value* whatever, unless such were *reasonable* and *adequate* for the purpose." (Italics supplied)

See also—

Hagar v. Reclamation Dist. No. 108, 4 S. Ct. 663; *Roller v. Holly,* 20 S. Ct. 410.

As we have already said, there is no affidavit of service of the Bill in Equity to be found anywhere. The notes of testimony of a purported hearing have never come to hand although diligent search for them has been made by petitioner's counsel. There is no agreement in writing executed by defendant corporation consenting to the appointment of a receiver among the files of the court below, nor was any evidence produced tending to show a legal service. Was there ever a more convincing set of facts tending to prove that a private citizen of one state was denied due process of law and the equal protection of the laws by the Court of another state?

The notice, if notice it can be called, which receiver's counsel sent to petitioner and defendant corporation, cannot

be considered a judicial notice, by virtue of any legal order. *No legal notice* judicially appears in the record of this case. Even if it be argued that petitioner had knowledge of the proceeding, but which is not conceded, the fact still remains that he received no judicial notice or notice by virtue of any legal order. The fact still remains that he received no notice so that he would have had ample time to appear and defend.

In *Rutherford's Petition,* 72 Pa. 82 it was held:

> "It is contrary to the bill of rights, and he is deprived of his money or its worth, without the judgment of his peers, and not according to the law of the land. It is true the judge says in his opinion, that Mr. Henderson had actual notice of the proceedings. But no notice appears in the record, and such notice referred to is merely accidental. It is not a judicial notice, or notice by virtue of any legal order. There may be cases where the omission of law to provide for notice might be supplied by judicial action under the general powers of the court. But then the notice should be the act of the court, and should judicially appear in the record."

B.

The process of a Court of Equity cannot compel a non-resident to leave his state and respond to proceedings brought therein. Should he subsequently appear, after a court without legal authority had acted, only to protect his rights in the subject matter of the controversy, such acts on his part will not confer jurisdiction.

It cannot be successfully argued that petitioner's subsequent appearance after the receiver was appointed *only*

to protect and defend his rights after being enjoined in the matter, will confer jurisdiction over him when the Court in the first instance *never had jurisdiction* over his *person* and the *subject matter* of the suit.

> "Where a Court has jurisdiction over the subject-matter of an action, a defendant may submit himself to the Court and thereby confer upon it jurisdiction over his person. *But, where the Court lacks jurisdiction over the subject-matter of a case, the defect is not cured by getting personal jurisdiction of the defendant.* Such a want of jurisdiction cannot be waived by pleading or any other form of consent; not even by going to trial." (Italics Supplied) *Mexican Nat'l Rwy. vs. Davidson,* 157 U. S. 201, 15 S. Ct. 563.

See also—

Home Ins. Co. vs. Sipp (3rd Circuit), 11 Fed. (2d) 474;

United States vs. New York & O. S. S. Co., 216 Fed. 61;

Scott vs. Hotchkiss, 115 Cal. 89.

In *Coleman's Appeal,* 75 Pa. 441, it was stated that no matter what steps a person over whom the Court had no jurisdiction, may take in protection or defense of his rights, subsequent to the unwarranted action of a court it will not thereby confer jurisdiction over him.

> "Lack of jurisdiction can be raised at any time. Whenever it affirmatively appears that the jurisdiction fails, the objection may be raised by the parties or the court itself."

Mansfield, C. L. M. Railway Co. v. Swann, 111 U. S. 379, 48 S. Ct. 510;

Perez vs. Fernandez, 202 U. S. 80, 26 S. Ct. 561;

Chicago B & Q Ry. Co. v. Williams, 220 U. S. 413, 31 S. Ct. 460;

United States v. Carrick, 298 U. S. 435, 56 S. Ct. 829.

C.

The policies of insurance had been assigned and transferred to petitioner many years prior to the filing of the Bill in Equity. There were no assets of Defendant Corporation remaining and therefore the interest of petitioner in the controversy was so great as to classify him as an indispensable party to the proceedings, without whose joinder and presence no court could make a valid decree affecting the rights and obligations of the parties, especially where the bill contained averments attacking his title to the policies and prayed that petitioner be enjoined from collecting what rightfully belonged to him.

A court of equity cannot, without violating the due process clause of the XIV Amendment, enjoin one who is an indispensable party, and where rights had already been determined by a verdict of the jury from enforcing his rights under an assignment, unless he be made a party to the proceeding and was given an opportunity to appear and be heard.

Paragraphs 15, 16, 17 and 18 of the original bill contain averments which openly attack the bona fides of Lofland's assignments of the insurance policies. (Delaware County Record Pages 7a, 8a.)

The same bill in Clause (C) of paragraph 28, which is part of the prayer thereof, is in words as follows:

"That defendant, its officers, agents and employees be enjoined from making any settlement with or payment to Clayton Lofland without first providing for payment of defendant's indebtedness to plaintiff."

Therefore, both in the averments and in the prayer of said bill, petitioner's rights are most prominently mentioned. How could then, a court of equity, with such a bill before it make any just and valid decision in the matter without first giving Lofland the chance to appear, make defence to the charges made against him therein, and protect his rights assailed? Perhaps the Court below overlooked the fact *that the one person who really would be affected by any action of the court, is neither a party defendant, nor present in court,* else it could not have taken the action which it did, and now having made this grave error, it has steadfastly refused to correct it even in the interest of justice and equity.

This is not a question which is merely technical nor one of convenience. The *rule as to indispensable parties goes absolutely to the jurisdiction* and without the presence of petitioner the lower court did not have the authority to grant plaintiff creditor the relief prayed for.

In *Williams et al v. Bankhead,* 86 U. S. 563, this Court said:

"Where a proceeding in equity concerns the disposal of a *specific fund,* a person claiming the fund, and liable by a *decree* to have it *wholly* swept from him, is an indispensable party." (Italics supplied)

It must be remembered that the Court below by its decree of June 6, 1934, appointing a receiver and enjoining petitioner from collecting the insurance policies assigned to him years earlier, *wholly swept* from him this *specific fund* which he was claiming rightly as his own.

In *Mallow vs. Hinde*, 12 Wheat 193, 198, where this Court affirmed the dismissal of the bill for lack of indispensable parties defendant, it was stated:

> "In this case the Complainants have *no rights separable* from, and independent of, the rights of persons not made parties. The rights of those before the Court lie at the very foundation of the claim of right by the plaintiffs, and a *final decision cannot be made* between the parties litigant, *without directly affecting and prejudicing the rights of others not made parties.* We do not put this upon the ground of jurisdiction, but upon a *much broader ground*, which must *equally apply to all Courts of equity*, whatever may be their structure as to jurisdiction. We put it on the ground, that *no Court can adjudicate directly upon a person's right, without the party being actually or constructively before the Court.*" (Italics supplied)

In *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 22 S. Ct. 308, 322, this Court held:

> "The established practice of courts of equity to dismiss the plaintiff's bill if it appears that to grant the relief prayed for would *injuriously affect* persons *materially interested* in the subject matter *who are not made parties* to the suit, is founded upon clear reasons, and may be enforced by the Court, sua sponte, though not raised by the pleadings or suggested by the Counsel." (Italics supplied)

To the same effect read:

Hovey et al v. Wilson, 9 Wall 501;
Shields v. Barrow, 17 How. 130;
Hipp v. Babin, 19 How. 271, 278;

Parker v. Winnipesgoll Lake Cotton & Woolen Co., 2 Black 545.

In *Harsley v. Langkamp and Elder*, 243 Pa. 550 an indispensable party was thus defined:

> "In a proceeding in equity a party is indispensable when he has such an interest that a final decree cannot be made without affecting it, or leaving the controversy in such a condition that a final determination may be wholly inconsistent with equity and good conscience."

See also *Flynn v. Brooks*, 105 Fed. (2d) 766.

D.

The question of Lack of Jurisdiction was never raised before, is not now being relitigated, and was never finally and conclusively determined against petitioner prior to the filing of the present petitions.

The Supreme Court of Penna. in a per Curiam opinion filed May 12, 1941, dismissed the appeal of petitioner from a decree of the Court below dismissing petitions filed by him asking that the Court vacate its order, entered June 6, 1934, appointing a receiver for the Hartford Sterling Co., and that the receivership proceedings be dismissed. The Supreme Court of Penna. erroneously held that it is the petitioner's "purpose in the present proceedings to relitigate questions which were necessarily involved in prior litigation in this Court and in the Federal Courts and which have already been finally and conclusively determined against him."

In the case of *Gordon v. Hartford Sterling Co.* (Lofland

et al. aplnts) 319 Pa. 174 no question of jurisdiction or want of legal service was raised. There the only question decided was one of procedure—whether a court of equity can authorize a receiver to compromise suits in the Federal Court over the objection of a majority of the creditors of the Hartford Sterling Co. The substantive rights and obligations of the parties were not in issue in that case and hence they were not decided by the Supreme Court of Pennsylvania.

In *Lofland v. Fox,* 98 F. 2d. 589, the question of jurisdiction was not raised, nor the want of service of legal process upon the defendant Corporation and/or its officers, and Lofland. There the appeal from the judgment of the District Court raised questions only concerning the amount Lofland was to receive under his assignments, denial to him of a jury trial, and whether the amount he had advanced for the acquittal of Avrach constituted a lien on the fund in the Registry of the United States District Court. Therefore, it is contended, the Supreme Court of Penna. and the Court of Common Pleas fell into error when they held that the questions now raised—want of jurisdiction and failure to serve legal process—were formerly raised in other previous proceedings by petitioner and finally and conclusively determined against him.

Again we urge that *in no other court or in any proceeding prior to the filing of the present petitions have the questions raised therein for the first time, been judicially and legally determined.*

The late Chief Justice of the Supreme Court of Penna. Von Moschzisker in his Stare Decisis, Res Adjudicata and Other Selected Essays, on pages 35 and 48 states:

> "In litigation between the same parties involving causes of action or objects of *judicial consideration,*

different from those previously reduced to judgment, the doctrine of res adjudicata is not applicable to *questions of law.*

• • • • • • • • • •

Where the subsequent or pending suit is a *different claim* or *cause of action* though between the same parties involving some of the same issues of fact res adjudicata is applicable only to such issues as were *actually raised* and *determined* in the former suit." (Italics supplied)

E.

Facts tried and decided in an action at law by a jury, cannot be re-examined in any court of the United States than according to the common law.

The jury in the United States District Court, after trial of the case of *Wm. D. Gordon, Secretary of Banking, Receiver of the Lansdowne Bank and Trust Co. v. Hartford Sterling Co.* in bankruptcy Cause No. 15412, was directed by the Court to find for the alleged bankrupt because—

"As the evidence has developed in this case the only thing transferred was the claim against insurance companies and which the insurance companies have refused to pay. There is no proof not only that it was of any value, but there is no proof that it constituted property of any kind. Counsel for the petitioning creditors assume that it is a chose in action of doubtful value, but, as a matter of fact, there has been a failure to prove that it even is a chose in action and therefore, the Court will direct a verdict in favor of the alleged bankrupt." (Record Pages 88a, 89a)

It will be noted therefore, that the Court and the jury held that the claim against insurance companies was transferred to Lofland. This fact can only be re-examined in any court upon a new trial granted by the Court in which the first trial was had or to which the record was returnable, or ordered by an appellate court for error in law.

The petitioning creditor in that case, plaintiff in this case, did not obtain a new trial in any one of the two ways just mentioned, and set aside the finding of the jury. Instead he filed a motion for a new trial (Record Pages 90a, 91a), and while counsel for petitioning creditor was carrying on negotiations with Lofland and inducing him to advance the sum of $2600 which he paid to create the fund of $36,000 paid into the District Court, withdrew his motion for a new trial without notice to anyone. Counsel for receiver, then acting *as Counsel for the Lansdowne Bank and Trust Company* made a valid and binding agreement with Lofland, that if he Lofland would advance the costs necessary to obtain the acquittal of Avrach, Lofland would be paid the full amount of his claims from the proceeds of the insurance policies (Record 77a, 82a). Lofland, relying upon the aforesaid agreement expended an additional sum of $2600 to create the fund of $36,000 which insurance company paid into the District Court. After counsel for receiver, then counsel for petitioning creditor, had made the aforesaid agreement and had induced Lofland to advance the aforesaid costs, withdrew his motion for a new trial in the bankruptcy case as aforestated, and went into the Court of Common Pleas of Delaware County for the appointment of a receiver. Notwithstanding that the jury in the District Court had already decided that the policies of insurance had been transferred to Lofland, plaintiff in this case proceeded to ask that a court of equity enjoin Lofland from collecting on the said policies and began an attack upon

his assignments which he also carried into the Federal Courts. In his unjust and unwarranted action he was aided by other counsel of Lofland, who as he, acting in adverse capacity, and contrary to legal ethics and the canons of the American Bar Ass'n, deserted Lofland and are now acting as counsel for receiver. This act on their part was a denial to Lofland of the equal protection of the laws and was violative of the VII Amendment to the Federal Constitution which provides inter alia—

> "And no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

In the case of *Garfield v. U. S.*, 29 S. Ct. 62, we find the following:

> "One who has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard for the right to be heard before property is taken or rights or privileges withdrawn which have been previously legally awarded, is of the essence of due process of law."

In the case of *Capital Traction Co. v. Hof*, 174 U. S. 13, 19 S. Ct. 580 the subject of trial by jury was much considered, and following a careful review of the prior decisions it was said by Mr. Justice Gray, speaking for this Court:

> "It must therefore be taken as established, by virtue of the Seventh Amendment to the Constitution, that either party to an action at law (as distinguished from suits in equity and admiralty) in a court of the United States, where the value in controversy exceeds

> $20 has a right to a trial by jury; that where a trial by jury has been had in an action at law, in a court either of the United States or of a State, the facts there tried and decided cannot be re-examined in any court of the United States, than according to the common law of England; that by the rules of that law, no other mode of re-examination is allowed other than upon a new trial, either granted by the Court in which the first trial was had or to which the record was returnable, or ordered by an appellate court for error in law; and therefore that, unless a new trial has been granted in one of these two ways, facts once tried by a jury cannot be tried anew, by a jury or otherwise in any Court of the United States."

CONCLUSION.

It is therefore, respectfully submitted that this case is one calling for the exercise by this Court of its judicial discretion and of its supervisory powers, in order that the errors herein pointed out may be corrected; that the law may be properly and authoritatively defined, and that the judgment of the Common Pleas Court of Delaware County and of the Supreme Court of Pennsylvania should be reversed in order that justice may be done to petitioner, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of Pennsylvania and finally reverse it.

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CHARLES ELMORE

IN THE

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BRIEF CONTRA PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

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ARGUMENT.

The Petitioner has presented a Petition to this Court applying for a writ of certiorari directed to the Supreme Court of Pennsylvania.

It is submitted that this Petition does not comply with the formal requirements for such Petitions as set forth in the Revised Rules of this Court. Rule 12 (1) states, inter alia:

> "If the appeal is from a state court the statement shall include a statement of the grounds upon which it is contended the questions involved

are substantial (Zucht v. King, 260 U. S. 174, 176, 177); specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e. g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears, (e. g., ruling on exception, portion of the court's charge and exception thereto, assignment of error) as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court. The provisions of this paragraph, with appropriate record page references, must be complied with when review of a state court judgment is sought by petition for writ of certiorari. (See Rule 38, par. 2.)"

First, the Petition, while it states reasons for the allowance of the writ, nowhere specifically states any reasons why the questions involved are substantial and merit review by this Court.

Secondly, the Petition nowhere contains any quotations from the record or summary thereof with reference to the record showing the specific rulings of the Supreme Court of Pennsylvania which are alleged to be of such a nature as to bring the case within the jurisdiction of this Court.

The Rules of this Court, quoted above, make it mandatory upon Petitioner to conform to said Rules. This the Petitioner has failed to do in the above instances, and it is, therefore, submitted that the Petition should be denied on this ground alone.

The Revised Rules of this Court also state the rules for the determination of whether the writ will be issued.

Rule 38, (5) states, inter alia:

> "5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

The Petition discloses no special or important reasons why a writ of certiorari should be issued.

On the contrary the Petitioner, while not a party to the proceedings nor having intervened took a very active part in same over a period of six years and never once objected or made any claim that the Common Pleas Court of Delaware County, Pennsylvania, or the Supreme Court of Pennsylvania, did not have jurisdiction over him.

Moreover, the Record shows that when the Petitioner first raised said question in 1940, the matter was argued and reargued in both the Common Pleas Court of Delaware County, Pennsylvania and in the Supreme Court of Pennsylvania and on all occasions decided against him. (Record, pages 4a, 100a, 106, 107.)

It is submitted that the Common Pleas Court of Delaware County, Pennsylvania, and the Supreme Court of Pennsylvania have not decided any federal question of substance not heretofore determined by this Court nor is their decision in this matter at variance with any decisions of this Court.

The principal ground upon which the Petition is based is that the Common Pleas Court of Delaware County, Pennsylvania, did not have jurisdiction to appoint a Receiver for the Hartford Sterling Company, Inc., a Pennsylvania Corporation, because the Petitioner, a creditor of the Corporation, while being notified by registered mail of the application for said appointment was not served with a copy of the Bill in Equity.

There is no requirement under the laws of Pennsylvania that creditors must be made parties to a Bill in Equity for the appointment of a Receiver nor that they be served with copies of the said Bill. The Petitioner cites no specific cases in support of his contention.

The Petitioner was notified of the application for the appointment of a Receiver, and presented a Petition on July 2, 1934, for the vacation of the Order appointing the Receiver, which was dismissed. He has been an active participant, filing numerous Motions and Petitions throughout the entire litigation of this matter.

On an Appeal by Petitioner from the allowance of a Petition by the Receiver to compromise certain suits the Supreme Court of Pennsylvania in GORDON, SECTY. OF BANKING v. HARTFORD STERLING CO. (LOFLAND ET AL., APPELLANTS) 319 Pa. 174 (1935) held (page 177):

> "Lofland, who is the active party appellant, admits that in the appointment of the receiver and in the proceedings looking forward to a compromise of the suits he took an active part, thus submitting himself to the jurisdiction of the court below."

The Court of Common Pleas of Delaware County, Pennsylvania, in dismissing Petitioner's second Petition to vacate the appointment of the Receiver held (Record, page 97a):

> "Our jurisdiction over the petitioner is equally

well established. He likewise received notice of the original hearing as did his then counsel. Whether he appeared then or not is not known but he himself stated in a hearing before the court on August 24, 1934, 'I have been here every time anything throughout the case was done from its very inception.' (Delaware County record page 129a). He likewise was the petitioner referred to in the following docket entry, 'July 2, 1934, Petition for rule to show cause why order for appointment of receiver should not be vacated. Eo die. Answer filed. Eo die. Order filed and petition refused.' No appeal was taken from this order and for that reason alone the present petition should be dismissed on the grounds of res judicata."

The Petitioner submitted himself to the jurisdiction of the Common Pleas Court of Delaware County and of the Supreme Court of Pennsylvania on numerous occasions, over a period of six years from the date the Receiver was appointed, and should not now be heard to claim that all the proceedings during said period are a nullity because the Court had no jurisdiction over him.

The Petitioner has now litigated twice in the Pennsylvania Courts the question of the vacation of the appointment of the Receiver in this matter. He has had more than his day in Court and should not be permitted to litigate this matter all over again ad infinitum.

The Record shows as follows (Record, page 1a):

"July 2, 1934, Petition for Rule to show cause why order for appointment of receiver should not be vacated, filed.

Eo die Answer filed.

Eo die Order filed and petition refused."

Petitioner did not appeal from said Order.

On May 31, 1940, the Petitioner filed another Petition in the Court of Common Pleas of Delaware County, Pennsylvania, seeking again to vacate the appointment of the Receiver.

The Common Pleas Court in its Opinion dismissing said Petition held in referring to the former Petition and Order. (Record, page 97a):

> "No appeal was taken from this order and for that reason alone the present petition should be dismissed on the grounds of res judicata."

The Supreme Court of Pennsylvania in dismissing Petitioner's appeal from said decision held (Record, pages 106, 107):

> "It is plainly appellant's purpose in the present proceedings to relitigate questions which were necessarily involved in prior litigation in this Court and in the Federal Courts and which have already been finally and conclusively deter- (fol. 107) mined against him. See Gordon v. H. S. Co. (Lofland et al., aplnts.), 319 Pa. 174; Lofland v. Fox, 98 F. 2d 589 (cert. den., 305 U. S. 658). The decree appealed from was, therefore, properly entered.
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> Appeal dismissed. Costs to be paid by appellant."

The Petition for writ of certiorari should be dismissed, not alone for failure to comply with the Rules of this Court, but because it is without merit.

It is therefore respectfully submitted that the Petition be dismissed and a writ of certiorari denied.

Respectfully submitted,

ABRAHAM WERNICK,
FRANK A. MOORSHEAD,
Counsel for Respondent.